SUCCESSIVE PROMISES OF THE SAME PERFORMANCE.

SOME difference of opinion and judicial decision has existed in regard to the possibility of the same promise or performance, serving as consideration for successive promises, and an examination of the question has the indirect value of testing the adequacy of received definitions of consideration. The cases may be divided into two classes, *first*, where the successive promises are made by the same party; *second*, where they are made by different parties.

I.

A frequent and convenient illustration of the first class arises where a builder engages to build a house in consideration of a promise by the owner of the land to make specified payments. Subsequently, the builder, finding his contract will prove unprofitable, informs the landowner that unless additional compensation is promised, work on the building will cease. Thereupon the landowner says, that if the builder will build the house, or agree to do so, further payment will be made. The house is accordingly built, and the landowner then refuses to pay more than the amount originally agreed upon.

The obvious objection to the second agreement, whether unilateral or bilateral in form, is, that as the builder was already bound to build the house, he suffers no detriment in building it or in repeating his promise to build it, and the landowner receives no benefit to which he was not previously entitled. Nevertheless, many decisions in this country have held such a second agreement constitutes a valid contract, and the objection just mentioned has been met, either by the statement that the second agreement was evidence of a rescission of the earlier contract, or by the argument that the prior contract would not have been performed, and though the non-performance would have subjected the promisor to liability to pay damages, his actual performance might be a greater benefit to the other party than a right of action.

The earliest cases involving the point are two English *nisi prius* decisions.[1] In those cases seamen had refused to work as they had agreed to do, by shipping articles, unless they were promised additional wages, and such a promise having been made, action was subsequently brought for breach of it. It was held that the seamen could recover only the wages which were originally agreed upon. In the first case, the decision was based on the ground that the second agreement was contrary to public policy. But in Stilk *v.* Myrick, Lord Ellenborough, while approving the earlier decision, doubted whether public policy was the true principle on which the decision was to be supported. "There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London, they had undertaken to do all they could under all the emergencies of the voyage. . . . Therefore, without looking to the policy of this agreement, I think it is void for want of consideration." Since these decisions, it does not seem to have been doubted in England that neither the promise to do a thing, nor the actual doing of it, will be a good consideration if it is a thing which the party is already bound to do by contract with the other party. The early decisions have been followed in later cases presenting the same facts.[2] No other cases seem to have arisen in England, as they have in this country, where the earlier obligation grew out of a bilateral obligation, subsisting at the time of the second agreement to do something other than pay money. And only in such a case is it possible to reason, that the earlier obligation has been rescinded by mutual consent,[3] but, from the language used by English cases and text-writers, and the decisions already referred to, it is fair to suppose that unless clear evidence of a rescission of the earlier contract was presented the subsequent agreement would be held *nudum pactum*.[4] And the making of the subsequent agreement in order to avoid a breach of the earlier, would not be regarded as such evidence.[5]

---

[1] Harris *v.* Watson, Peake, 72; Stilk *v.* Myrick, 2 Camp. 317.

[2] Frazer *v.* Hatton, 2 C. B. N. S. 512; Harris *v.* Carter, 3 E. & B. 559.

[3] A debt or other unilateral obligation cannot be extinguished by parol agreement. See *infra*, p. 35, note 2.

[4] See Bayley *v.* Homan, 3 Bing. N. C. 915; Jackson *v.* Cobbin, 8 M. &. W. 790; Willis *v.* Peckham, 1 Br. & B. 515; Crowhurst *v.* Laverack, 8 Ex. 208; Mallalieu *v.* Hodgson, 16 Q. B. 689; Leake on Contracts (3d ed.), 538, 539; Pollock on Cont. (4th ed.) 176.

[5] Harris *v.* Carter, 3 E. & B. 559.

A few years after the decision of Stilk *v.* Myrick, a similar case arose in the highest court of New York,[1] and the court, after stating that the enforcement of the agreement to pay higher wages was contrary to public policy, stated, as another ground of decision: "The promise to give higher wages is void for the want of consideration. The seamen had no right to abandon the ship at Beaufort, and a promise to pay them an extra price for abstaining from doing an illegal act was a *nudum pactum*."

Oddly enough, in the same volume of reports is contained the case which has served in large part as the foundation for the doctrine that a second agreement, made after refusal to perform a prior one, is binding.[2] In Lattimore *v.* Harsen, the plaintiffs and defendant had entered into a written contract by which the plaintiffs agreed, under a penalty of $250, to open a cartway for $900. After some part of the work was done, the plaintiffs became dissatisfied with their contract and determined to abandon it. The defendant then agreed that if they would go on and complete the work, he would pay them by the day without reference to the written contract. The court allowed the plaintiffs to recover under the second agreement, and said, "By the former contract, the plaintiffs subjected themselves to a certain penalty for the non-fulfilment, and if they chose to incur this penalty, they had a right to do so, and notice of such intention was given to the defendant, upon which he entered into the new arrangement. Here was a sufficient consideration for this promise." Bartlett *v.* Wyman was not cited. In Massachusetts, a few years later, a similar question arose in regard to a building contract, and in that case also the plaintiff was allowed to recover;[3] the court saying that "the first contract was waived." These cases have since been followed, not only in New York[4] and Massachusetts,[5] but in several other States.[6] Sometimes, as in Bishop *v.* Busse,[7] the decision of the court is rested on the assertion that the promisor

[1] Bartlett *v.* Wyman, 14 Johns. 260.

[2] Lattimore *v.* Harsen, 14 Johns. 330.

[3] Munroe *v.* Perkins, 9 Pick. 298.

[4] Stewart *v.* Keteltas, 36 N. Y. 388.

[5] Holmes *v.* Doane, 9 Cush. 135; Rollins *v.* Marsh, 128 Mass. 116; Rogers *v.* Rogers, 139 Mass. 440; Thomas *v.* Barnes, 156 Mass. 581, 584.

[6] Stoudenmeier *v.* Williamson, 29 Ala. 558; Bishop *v.* Busse, 69 Ill. 403; Cooke *v.* Murphy, 70 Ill. 96; Coyner *v.* Lynde, 10 Ind 282; Moore *v.* Detroit Locomotive Works, 14 Mich. 266; Goebel *v.* Linn, 47 Mich. 489; Conkling *v.* Tuttle, 52 Mich. 130; Osborne *v.* O'Reilly, 42 N. J. Eq. 467; Lawrence *v.* Davey, 28 Vt. 264.

[7] 69 Ill. 403.

probably considered the right to recover damages for breach of the prior contract of less advantage than actual performance of the promise, and this advantage to the promisor, is, it is said, sufficient consideration to support the second promise. In other cases, as in the Massachusetts decisions, a rescission of the earlier contract is relied on. Neither reason will support the decisions. Granting that a benefit or advantage moving from the promisee to the promisor is a good consideration, surely nothing can be regarded by the law as a benefit to the promisor unless it is something more than what he was already entitled to. The cases, therefore, demand the further assumption that, on breach of the original contract or on the announcement that it was about to be broken, the only thing to which the other party was entitled was a right of action for damages. If this be granted, it is obivous, that the substitution of performance, or a promise of performance, of the original contract for such a right of action affords ample consideration for a promise. But this cannot be granted. It is doubtless true that a promisor can always refuse to perform his promises, and in most cases the only liability he incurs thereby is to pay damages, but this is far from saying that when one enters into a contract he in effect agrees to perform or pay damages at his option. His duty is to perform the contract, and his co-contractor is entitled to the performance.[1] If the duty is not performed, the only relief the law can generally give is an award of money damages; but the inadequacy of a legal remedy to the plaintiff's right is not peculiar to the law of contracts. It would be an odd statement of the law to say that one who takes another's property, believing it to be his own, has a right to retain it on paying its value, and that the owner has no right to the property, but only to a right of action of damages. Yet, in such a case also, an award of money-damages equal to the value of the property is generally the owner's only relief. Probably no court would sustain a promise made in consideration of the surrender of converted property to its owner,[2] yet the promisor certainly may derive a benefit from

---

[1] This is illustrated by the cases in equity which hold that a contract if of such a nature as to be enforceable in equity will be specifically enforced, though the contract provides that in case of breach the damages shall be liquidated at a specified amount. The defendant has no right to pay the damages and claim exemption from his promise. See Fry on Specific Performance, chap. iii.

[2] See Cowper *v.* Green, 7 M. & W. 633; McCaleb *v* Price, 12 Ala. 753; Crosby *v.* Wood, 6 N. Y. 369; Jones *v.* Miller, 12 Mo. 408; Cleveland *v.* Lenze, 27 Ohio St. 383.

the surrender which he might not otherwise obtain. But here, as in the general class of cases under consideration, it is a benefit to which he has a right, whether the right is, or is not, adequately enforceable.

The rescission of the prior contract may seem a more plausible ground to rest the decisions on; and it must be admitted, at the outset, that a rescission of one contract and the substitution for it of another in regard to the same subject-matter is not only possible, but is in fact very common. But a narrower question than that is presented, namely: Is the refusal of a contractor to perform his contract, and the subsequent promise by the other party of greater compensation than the original contract provided for, in order to induce performance, evidence sufficient to justify a court or a jury in finding that a rescission has in fact taken place? It is submitted that it is not, that no intention is shown to release the contractor from his promise, but rather something additional is promised him to induce him to perform it.[1] Further, it may well be doubted whether a refusal to go on with a half-performed contract unless further compensation is given is not such compulsion as might justify a recovery of money actually paid,[2] and *a fortiori* invalidate a promise secured by such means. Take, for instance, the case of Goebel *v.* Linn.[3] There, the defendants, brewers, had made a contract for ice for a year, at two dollars a ton. In the spring, the ice company notified the defendants that they should no longer deliver ice at the contract price. One of the defendants testified without contradiction that no ice could be procured of other parties at the time, that shortly before the company's refusal ice was obtainable, and that this was called to the attention of the manager of the company, but that he said the company would fulfil its contract. Failure to obtain ice would have involved a direct loss of stock on hand valued at $15,000, and an indirect loss of business. Under these circumstances the defendant agreed to pay three dollars and a half a ton, and gave notes for ice received at that rate, on one of which the action was based. The defendant was held liable. Cooley, J., who delivered the opinion of the court, seems to rest the decision on the fact that it was an advantage to the defendants to make a new arrangement rather than sue for damages, and the facts he said did not show duress. This seems

---

[1] See Harris *v.* Carter, 3 E. & B. 559.

[2] See Keener on Quasi Contracts, chap. xi.

[3] 47 Mich. 489.

a very harsh decision.[1] In Endriss *v.* Belle Isle Co.,[2] where the facts were similar, the brewer, having paid for ice received, according to the second agreement, brought an action for damages for breach of the original contract, and was held entitled to submit to the jury the question whether that contract was rescinded. It is hard to reconcile this with the preceding case,[3] which seems necessarily to treat the prior contract as rescinded. Otherwise, there was no value given or received for the note, and besides the circuity of action which would result from allowing a recovery in both actions should have been a sufficient reason for a different decision in an action on the second contract.

If excuse is needed for saying so much, it is to be found in the fact that the cases criticised, though contrary, it is believed, to the law of England, and to general principles universally admitted, perhaps represent, on the exact point which they cover, the weight of American authority. There are, however, decisions to the contrary. In Ayres *v.* Chicago, Rock Island & Pac. R. R. Co.,[4] it was held that a promise to pay additional compensation to a railroad contractor, upon his refusal to comply with a contract to construct a railroad, was void. Decisions to the same effect have been made in a few other cases,[5] and in Illinois and Michigan late decisions make it probable that the earlier cases referred to above would not be followed to their full extent.[6]

II.

Turning now to the second class of cases of which it was proposed to treat, we find curiously enough that in England performance or promise of performance of something which one was at the time bound to perform by contract with a third person is held a sufficient consideration, while in this country the contrary is held almost universally, though, in many jurisdictions, as just shown, a previous contract between the same parties does not

[1] It is criticised in Lingenfelder *v.* The Wainwright Brewing Co., 103 Mo. 578, 594.

[2] 49 Mich. 279.

[3] Rogers *v.* Rogers, 139 Mass. 440, is a contrary decision.

[4] 52 Iowa, 478.

[5] McCarty *v.* Hampton Assoc., 61 Iowa, 287; Lingenfelder *v.* The Wainwright Brewing Co., 103 Mo. 578; Festerman *v.* Parker, 10 Ired. 474; Erb *v.* Brown, 69 Pa. 216. See also Proctor *v.* Keith, 12 B. Mon. 252; Eblin *v.* Miller's Exec., 78 Ky. 371; Conover *v.* Stillwell, 34 N. J. L. 54, 57.

[6] Nelson *v.* Pickwick Associated Co., Ill. 30 App. 333; Golds Borough *v.* Gable, 140 Ill. 269; Widiman *v.* Brown, 83 Mich. 241.

invalidate the second agreement. The well-known cases of Shadwell *v.* Shadwell,[1] and Scotson *v.* Pegg,[2] establish the English law.[3] In both cases the second contract was unilateral, actual performance of the earlier obligation being the sole consideration of the promise sued on. The cases seem to be rested on the ground that the performance was a benefit to the defendant, and it is on this ground alone that they can be rested. This is the only class of cases where it is possible for the promisor to receive a benefit to which he was not previously entitled, moving from the promisee, and yet the promisee suffer no detriment. The promisor has certainly received something to which he was not entitled, but the promisee has done nothing which he was bound not to do. If the ordinarily received definition of consideration is accurate — that it is some detriment to the plaintiff *or* some benefit to the defendant moving from the plaintiff — these decisions are sound. The definition, however, it need hardly be said, originally had no reference to this class of cases. It is a statement of the past history of consideration, rather than of the present doctrine. No doubt, during its development consideration meant something more or different than something given by the promisee in exchange for the promise, but that is the end to which it gradually tended, and which it may now be held to have reached.[4] This definition makes what the promisee gives — that is, the detriment[5] suffered by him — the universal test of the sufficiency of consideration, and by this test, as the promisee has given nothing which he was not already bound to give, the promise is not binding. If it be argued that judges have said that consideration may be either a benefit or a detriment so many times that it is now law, the answer is that they have also said a great many times that doing what one is bound to do is not a good consideration, and both these propositions cannot be true. The American cases hereafter cited, which not only lay

[1] 30 L. J. C. P. 145. Cited with approval in Pegge *v.* Lampeter Union, L. R. 7 C. P. 366, 371.

[2] 6 H. & N. 295.

[3] Jones *v.* Waite, 5 Bing. N. C. 341, a decision of the Exchequer Chamber (affirmed in the House of Lords, 9 Cl. & F. 101), seems not to have been cited or considered in Shadwell *v.* Shadwell and Scotson *v.* Pegg. Although that decision turned on a different point, the language and reasoning of several of the judges is clear authority that the second agreement is invalid.

[4] Langdell, Summary, § 64; Pollock on Contracts, chap. iv.

[5] Detriment is used in a broad sense. It is intended to include doing or refraining from doing anything whatever, when the promisee had the right to adopt a contrary course.

down the general rule that doing what one is bound to do is not a good consideration, but apply it to this class of cases, therefore carry out to its logical conclusion the doctrine of consideration, in making the test what the promisee has given, not what the promisor has received.

Conceding most of this argument, an attempt has been made by some to distinguish unilateral and bilateral agreements. In Professor Langdell's Summary of the Law of Contracts,[1] it is said: "It will sometimes happen that a promise to do a thing will be a sufficient consideration when actually doing it would not be. Thus, mutual promises will be binding though the promise on one side be merely to do a thing which the promisee is already bound to a third person to do, and the actual doing of which would not, therefore, be a sufficient consideration. The reason of this distinction is, that a person does not, in legal contemplation, incur any detriment by doing a thing which he was previously bound to do, but he does incur a detriment by giving another person the right to compel him to do it, or the right to recover damages against him for not doing it. One obligation is a less burden than two (*i. e.* one to each of two persons), though each be to do the same thing." The same distinction is also involved in the discussion of the subject by Sir Frederick Pollock, in the first edition of his treatise on the law of contracts.[2] Sir William Anson, however, pointed out a fallacy in this line of reasoning,[3] in that it assumes that the second promise does impose an obligation upon the promisor. As both parties to a bilateral contract are bound or neither is bound, this assumption involves the further assumption that the second promise is itself a sufficient consideration to support the counter-promise, — the very point in dispute. Anson then suggests another line of reasoning to sustain the second agreement.[4] "The case may however be put in this way; that an executory contract may always be discharged by agreement between the parties; that A and M, parties to such an agreement, may thus put an end to it at any time by mutual consent; that if X says to A, 'Do not exercise this power, insist on the performance by M of his agreement with you, and I will give you so and so,' the carrying out by A of his agreement, or his promise to do so, would be a consideration for a promise by X. A in fact agrees to abandon a right which he might have exercised in concurrence with M, and this, as we have seen, has always

[1] Sect. 84.
[2] Pollock, Contracts (1st ed.), 158.
[3] Anson, Contracts (1st ed.), 80.
[4] Page 81.

been held to be consideration for a promise." This reasoning is adopted by Pollock in the later editions of his treatise.[1]

It seems impossible to dispute Anson's criticism of the theory advanced by Pollock and Professor Langdell, but it has not been always observed that the same criticism may be made in the case of every bilateral contract if the test of the sufficiency of consideration is defined, as it usually is, as a benefit conferred upon the promisor or a detriment suffered by the promisee. To enter into a binding obligation to do or not to do anything whatever is always a detriment, and on the other hand, unless a promise imposes an obligation, no promise whatever can be considered a detriment. It is, therefore, assuming the point in issue to say a promise is a detriment because it is binding. There are but two ways out of the difficulty. The first is to say that for the purpose of testing the sufficiency of consideration the law assumes that the promise is binding, or, in other words, mutual promises, unless merely repetitions of previous obligations to the same person, are always sufficient consideration for each other. The other way is to revise slightly the test of consideration in a bilateral contract, seeking the detriment necessary to support a counter-promise, in the thing promised, and not in the promise itself. If the first way is adopted, the result is that not only is a promise to do something which the promisor is then bound by contract with a third person to do, a good consideration, but so also is a promise to receive a pure benefit, a promise to forbear a groundless suit against a third person, and a promise to refrain from committing a tort against a third person. These consequences seem sufficient reason for discarding this theory. If a promise to receive a pure benefit, for instance a gift, is sufficient consideration for a promise to give it, an easy way is offered to make, in effect, a valid gift without delivery; and it may well be doubted whether the courts would sanction such a result.[2] A mutual agreement to rescind a unilateral obligation, which is much the same thing as a promise to give, is, it is well settled, ineffectual.[3] There is nothing in the cases relating to forbearance and promises of forbearance to warrant the supposition that the case would be treated differently when the groundless suit to be forborne is against a third person, and an in-

---

[1] 4th ed., pp. 178, 179.

[2] Holmes, Common Law, 304.

[3] Foster *v.* Dawber, 6 Ex. 839, 851; Williams *v.* Stern, 5 Q. B. D. 409; Westmoreland *v.* Porter, 75 Ala. 452; Crawford *v.* Millspaugh, 13 Johns. 87; Kidder *v.* Kidder, 33 Pa. 268.

complete search has revealed at least one case where such a promise was held an insufficient consideration.[1] It is of course certain that a promise to forbear to commit a tort against a third person is not a valid consideration. This must be accounted for under the view now criticised as resting solely on public policy, but it has generally been supposed that such an agreement also lacked consideration. We are therefore driven to the alternative of modifying the ordinarily received definition of consideration. If the test of the sufficiency of consideration be made whether the promisee has incurred a detriment at the request of the promisor (which would constitute a unilateral contract), or has promised something the performance of which will be, or may be,[2] a detriment (which would constitute a bilateral contract), logical consistency is attained. Nor is it attained at the expense of disregarding the authorities. The assertion is ventured that an examination of the cases will show that, however, judges define consideration, when they examine the sufficiency of consideration, either in case of unilateral or bilateral contracts, it is the thing to be done which they consider, — the performance, not the fact that there is an obligation to perform.[3]

Furthermore, in 1875, Lush, J., delivering the opinion of the Court of Exchequer Chamber, in Currie *v.* Misa,[4] said, "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit, accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or *undertaken* by the other." This definition, which involves substantially the distinction contended for, is adopted by Pollock[5] and Anson.[6]

Though Anson's criticism of the theory advanced by others must be deemed sound, his own explanation cannot be accepted as satisfactory. It may be granted that a promise not to rescind the earlier contract would serve as consideration for a promise. It is doubtful whether merely failing to rescind would

---

[1] Bates *v.* Sandy, 27 Ill. App. 552.

[2] It is sufficient if the performance promised may be a detriment. A promise to insure, for instance, may be performed in a particular case without detriment, but the chance that it may not be is sufficient to make it a good consideration.

[3] See, for instance, Lord Abinger's reasoning in Jones *v.* Waite, 5 Bing. N. C. 341, 356, or that of Brown, J., in Robinson *v.* Jewett, 116 N. Y. 40, 53 In each of these cases, speaking of a contract clearly bilateral, the court pointed out the insufficiency of the thing promised.

[4] L. R. 10 Ex. 153, 162. [5] 4th ed., p. 167. [6] 2d ed., p. 69.

be sufficient without proof that the willingness of the other party to the contract made rescission possible, and therefore refraining from it a detriment. But the great difficulty with the theory is that it does not fit the facts. It may well be that one of the parties to the second contract is not aware of the existence of the earlier contract, and, in any event, a rescission of the earlier contract might obviously be made without liability on the second contract if the performance promised was actually carried out. If that be done, the second promisor cares nothing whether the original contract remains in force or is abrogated.[1]

It may, however, be argued that though performance of the prior contract be not a good consideration because unless it appears that both parties to that contract were willing to rescind, no detriment to the promisee can be found, yet a promise of such performance is a good consideration because, owing to the possibility of a rescission or other excuse for not carrying out the prior contract, performance of the second contract when the time for performance comes may be a detriment. This is the strongest argument that can be made in support of the second contract. But it goes too far. In every case where the promisor is already bound to do the thing promised, it is possible that, before the time the performance arrives, the earlier bond may be released by change in the law or otherwise. The truth is that the law deals with the question, and as a practical matter must deal with the question, on the supposition that the obligations binding the parties to-day will continue to bind them, and hence the second promise is *nudum pactum.*

There is but one case in which the court takes the distinction between the validity of a unilateral and a bilateral contract put forward by Sir Frederick Pollock and Professor Langdell, though afterwards withdrawn by the former. In Merrick *v.* Giddings,[2] on the authority of these writers, the distinction was asserted. Since Anson's criticism of this view and Pollock's withdrawal of it from the later editions of his treatise, Merrick *v.* Giddings is not likely to be followed, and certainly it is of doubtful expediency to establish so delicate a distinction between bilateral and unilat-

[1] It must be remembered that English text-writers labor under the disadvantage of feeling bound to support and furnish some explanation of the decisions in Shadwell *v.* Shadwell and Scotson *v.* Pegg. If it were not for this, it is quite possible that the matter would be discussed in another fashion.

[2] 1 Mack. (D. C.) 394.

eral contracts. The almost uniform current of authority in this country is that neither performance nor promise of performance of what one is already bound to do by contract with a third person, is a sufficient consideration to support a promise.[1]

The only American authority to the contrary, aside from Merrick *v.* Giddings, is a remark in Day *v.* Gardner,[2] which was a bill to foreclose a mortgage, in defence of which there was set up a contract, that if the defendant paid certain taxes the mortgage should be reduced. The court, after holding that the defendant was not otherwise liable to pay the taxes, said: "But if a personal liability had existed, the duty which such liability would have imposed would have been a duty to the government, which was entitled to the taxes, and not to the mortgagee; and I am not prepared to say that, in such a condition of affairs, the collateral benefit resulting to the mortgagee from the payment of taxes which were entitled to priority in payment over his mortgage, would not constitute a perfectly valid consideration for such a contract as that on which the defence in this case rests." But this *dictum* can have little weight as against the numerous decisions already cited, which enforce the rule, at once logical, readily understood and applied, and as just in its operation as any hard-and-fast rule can be, that neither performance nor promise of performance of what one is already bound to perform is a valid consideration.

Samuel Williston.

---

1 See Johnson's Adm. *v.* Seller's Adm., 33 Ala. 265; Havana Press Drill Co. *v.* Ashurst, 35 N. E. Rep. 873 (Ill. 1893); Peelman *v.* Peelman, 4 Ind. 612; Ford *v.* Garner, 15 Ind. 298; Reynolds *v.* Nugent, 25 Ind. 328; Ritenour *v.* Mathews, 42 Ind. 7; Brownlee *v.* Lowe, 117 Ind. 420; Newton *v.* Chicago, &c. Ry. Co., 66 Iowa, 422; Schuler *v.* Myton, 48 Kan. 282; Putnam *v.* Woodbury, 68 Me. 58; Gordon *v.* Gordon, 56 N. H. 170; Bartlett *v.* Wyman, 14 Johns. 260; Vanderbilt *v.* Schreyer, 91 N. Y. 392; Seybolt *v.* N. Y., L. E. & W. R. R. Co., 95 N. Y. 562; Robinson *v.* Jewett, 116 N. Y. 40; Sherwin *v.* Brigham, 39 Ohio St. 137; Wimer *v.* Overseers of the Poor, 104 Pa. 317; Davenport *v.* Congregational Society, 33 Wis. 387.

2 42 N. J. Eq. 199.